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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 535

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In re THE AMERICAN SUGAR REFINING COMPANY, PETITIONER.

THE AMERICAN SUGAR REFINING COMPANY,
PETITIONER,

versus

THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, RESPONDENT.

Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States, for its review and determination, the case of The American Sugar Refining Company, Plaintiff in Error, vs. The City of New Orleans, Defendant in Error, No. 920, November Term, 1899; and

Application for leave to file petition, in the alternative, for Writ of Mandamus to the Judges of the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, FOR A WRIT OF MANDAMUS.

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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI, OR, IN THE ALTERNATIVE, FOR A WRIT OF MANDAMUS.

The question involved in this application is as to the appellate jurisdiction of the Circuit Court of Appeals, under the Appellate Courts Act of March 3d, 1891.

The City of New Orleans sued the American Sugar Refining Company in the Civil District Court for the Parish of Orleans, Louisiana, for the sum of $6,250.00, with statutory interest, as being due for a license tax for the year 1899 as a sugar refiner in the City of New Orleans.

The defendant in due time filed a petition in the State Court for removal of the suit to the United States Circuit Court for the Eastern District of Louisiana, setting up in its petition for removal that it was, at the time of the institution of the suit, and still was, a corporation organized under the laws of New Jersey and domiciled in that State, and that the plaintiff was at the time of the institution of the suit, and still was, a municipal corporation under the laws of Louisiana. This petition was duly verified, the proper order for removal was obtained, bond was given and a transcript of the proceedings in the State Court was duly lodged in the United States Circuit Court for the Eastern District of Louisiana.

After proceedings not pertinent to the question here involved, the City filed a reformed petition, claiming the license tax as originally claimed, but omitting its former prayer for a lien upon defendant's property to secure the tax and also its prayer for an injunction to restrain defendant from prosecuting its business.

Defendant answered in the Circuit Court: *First*, that it was a manufacturer and as such was exempt from municipal license taxation under the terms of Article 229 of the Constitution of Louisiana of 1898, which exempts all manufacturers save a few specified excepted ones; and, *Second*, that the ordinance of the City of New Orleans under which the license tax was claimed was in contravention of the

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Fourteenth Amendment to the Constitution of the United States, in that it was based upon Act No. 171 of the General Assembly of Louisiana of 1898, which Act was in contravention of the Fourteenth Amendment because it sought to make an illegal discrimination against sugar refiners who were not planters or farmers, and in favor of sugar refiners who were planters or farmers, by exempting the latter from all license taxation and by imposing a tax upon the former; that under Article 229 of the Constitution of Louisiana, municipal corporations were prohibited from exacting a greater license tax than the State, and that as the State law exacting a tax was unconstitutional and no legal tax was thereby exacted, the City ordinance exacting the license tax for the same occupation was also unconstitutional.

Upon the trial of the case in the Circuit Court, defendant admitted that it was a sugar refiner in the City of New Orleans, and that its gross receipts exceeded the amount charged in plaintiff's petition. The City thereupon offered in evidence the municipal ordinance levying the tax and rested. Defendant produced witnesses who established the nature and character of the defendant's business, the character of the operations resorted to in the refining of sugar, the changes in the material used to produce the refined product and the processes necessary for the accomplishment of that result. Defendant's testimony was uncontradicted in any particular; there was absolutely no controversy as to the facts constituting the nature, character and results of defendant's business. Defendant, also, during the progress of the trial, filed an exception of no

cause of action predicated on the theory that a sugar refiner is, as a matter of law, a manufacturer.

At the close of the testimony, defendant requested the Court to charge the jury to bring in a verdict in its favor, both upon the ground that defendant was a manufacturer and therefore exempt, and upon the ground that the said ordinance was in contravention of the Fourteenth Amendment to the Constitution of the United States; and plaintiff also requested the general charge in its favor.

After argument, the Court charged the jury to bring in a verdict for the amount claimed by the plaintiff and denied the charges requested by the defendant, all of which was duly excepted to by defendant, and a bill of exceptions embodying the exceptions taken was duly settled and sealed by the presiding Judge.

Defendant applied for and obtained a writ of error from the Circuit Court of Appeals for the Fifth Circuit to review the judgment of the Circuit Court. The errors assigned were that the Circuit Court erred: (1) in refusing the charge that defendant was a manufacturer, as a matter of law and upon the whole evidence, and therefore exempt; (2) in refusing to charge that the municipal ordinance under which the license tax was claimed was in contravention of the Fourteenth Amendment to the Constitution of the United States; and (3) in charging the jury to bring in a verdict for the plaintiff.

Bond for a *supersedeas* was given and in due course the transcript of the record was lodged in the Circuit Court of Appeals for the Fifth Circuit.

The cause came on to be heard in the Circuit Court of Appeals and was argued upon the errors assigned.

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The Court of Appeals thereafter rendered a judgment dismissing the suit for want of jurisdiction upon the ground that the controlling question in the cause was one involving the application and construction of the Constitution of the United States, and that the Supreme Court of the United States is, under the Fifth Section of the Appellate Courts Act of March 3d, 1891, vested with sole appellate jurisdiction in such cases.

The plaintiff in error applied for a rehearing and submitted a brief thereon. The Court allowed the petition for rehearing to be filed and took the same under advisement. On November 20th, 1900, the Court denied the petition for rehearing without assigning reasons therefor.

Petition is now made to this Honorable Court for a writ of *certiorari* requiring the Circuit Court of Appeals to send up the case to this Court; or, if a writ of *certiorari* be not granted, in the alternative for a writ of mandamus.

We conceive that the petition for a writ of mandamus, in the alternative, is properly addressed to the Court, because of the circumstances of the case and upon the authority of **American Construction Co. vs. Jacksonville Ry. Co., 148 U. S. 372.**

We submit that the Circuit Court of Appeals has jurisdiction of the writ of error. The jurisdiction of the Circuit Court was sought and attached solely because of the diverse citizenship of the parties to the suit, and under repeated decisions of this Court, the ground upon which the jurisdiction of the Circuit Court attaches is alone to be looked to in determining the character of the suit for the purposes

of an appeal or writ of error under the Act of March 3, 1891.

In considering a case involving the appellate jurisdiction of the Courts of Appeals under the Sixth Section of the Act of March 3d, 1891, MR. JUSTICE GRAY said:

"The effect of these provisions is that, in any case in which the jurisdiction of the Circuit Court depends entirely on the citizenship of the parties (as in the cases now before us), but in which the jurisdiction of that Court is not in issue, the appeal given from its judgments and decrees, whether final or interlocutory, lies to the Circuit Court of Appeals only; and the judgments of the latter Court are final, unless either that Court certifies questions or propositions of law to this Court, or else this Court, by *certiorari* or otherwise, orders the whole case to be sent up for its review and determination." **American Construction Co. vs. Jacksonville Ry., 148 U. S. 372 (382).**

In a subsequent case, MR. CHIEF JUSTICE FULLER delivered the opinion of the Court, saying in part:

"The jurisdiction of the Circuit Court was invoked December 2d, 1885, by the filing of the complaint, from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested, or could be asserted, on any other ground. The Federal question now suggested did not emerge until the defendant set up its second defense. * * *

"The jurisdiction had, however, already attached and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred.

"If the plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented.

"We are of opinion that the judgment of the Circuit Court of Appeals was final under the sixth section, and

that the writ of error cannot be maintained." **Colorado Central Mining Co. vs. Turck, 150 U. S. 138 (144).**

The identical question here involved appears to have been considered in a recent case. MR. CHIEF JUSTICE FULLER, speaking for the Court, after quoting at length from TURCK'S CASE, said further:

"Applying these principles to the case at bar, it is apparent that this writ of error will not lie. The jurisdiction of the Circuit Court was invoked by the issue of summons September 15th, 1892, followed by the filing of the statement of claim or declaration, September 22d, 1892, and therefrom it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, and it did not appear therefrom that jurisdiction was rested or could be asserted on any other ground. * * *

"The jurisdiction of the Circuit Court depended entirely upon diverse citizenship when the suit was commenced and to that point of time the inquiry must necessarily be referred. Had the case been brought to this Court from the Circuit Court, the writ of error could not have been entertained." **Borgmeyer vs. Idler, 159 U. S. 408 (414).**

To the same effect is **Press Publishing Co. vs. Monroe,** in which case MR. JUSTICE GRAY said:

"The complaint, alleging that the plaintiff was a citizen of Illinois and the defendant a citizen of New York, and claiming damages in a sum of more than $2000.00, showed that the Circuit Court had jurisdiction of the case by reason of the parties being citizens of different States. The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United States, or in any way mention or refer to that Constitution or to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the fore-

going considerations and as was expressly adjudged in Colorado Co. vs. Turck, above cited, is insufficient to support the jurisdiction of this Court to review, by appeal or writ of error, the judgment of the Circuit Court of Appeals.

"The jurisdiction of the Circuit Court having been obtained and exercised solely because of the parties being citizens of different States, the judgment of the Circuit Court of Appeals was final, and the writ of error must be dismissed for want of jurisdiction." **Press Publishing Co. vs. Monroe, 164 U. S. 105 (112).**

At the same term, in another case, MR. JUSTICE BROWN said:

"The Circuit Court of Appeals refused to allow an appeal in this case upon the ground that its jurisdiction of the case was 'dependent entirely upon the opposite parties to the suit or controversy being citizens of different States,' and, therefore, under Section Six of the Court of Appeals Act of March, 1891, the decree was final and not the subject of an appeal of this Court. * * *

"In this case the original bill averred the complainant to be a citizen of Pennsylvania, and the defendant a national bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the State of Massachusetts. As the bill was filed after the Act of 1888 took effect, it must be deemed a suit dependent upon citizenship alone. But, even if another ground were developed in the course of the proceedings, the judgment of the Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of citizenship." **Ex parte Jones, 164 U. S. 691 (692, 693).**

Even when a Federal question is raised by the plaintiff in a supplemental bill, the Circuit Court of Appeals has appellate jurisdiction when the jurisdiction of the Circuit Court was originally invoked on the ground of diversity of citizenship of the parties to the suit.

MR. CHIEF JUSTICE FULLER, speaking for the Court in **Third St. Ry. Co. vs. Lewis,** said:

"Although the record does not contain the original bill, it is apparent that the jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship, and that the interest of appellants in the mortgaged premises was acquired after the commencement of the action. * * *

"This supplemental bill made appellant a party defendant as claiming an interest, but the jurisdiction still rested on diversity of citizenship. The decree of the Circuit Court of Appeals was, therefore, made final by the statute, and the appeal cannot be sustained. * * *

"It is thoroughly settled that under the Act of August 13, 1888, C. C. 886, 25 Stat. 454, the Circuit Court of the United States has no jurisdiction, either original or by removal from a State Court, of a suit as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim. *Tennessee vs. Union and Planters' Bank, 152 U. S. 454; Metcalf vs. Watertown, 128 U. S. 586, 589; Colorado Central Mining Co. vs. Turck, 150 U. S. 138.* If it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defense. And so when jurisdiction originally depends on diverse citizenship the decree of the Circuit Court of Appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings. *Ex Parte Jones, 164 U. S. 691.*" **Third St. Ry. Co. vs. Lewis, 173 U. S. 457 (460).**

Again, in **Pope vs. Louisville Ry. Co.,** MR. CHIEF JUSTICE FULLER said:

"The only ground of Federal jurisdiction set up in the bills was diversity of citizenship, and if the decrees therein had been passed on by the Circuit Court of Appeals, the decision of that Court would have been final under the statute. And as this suit was in effect merely in collection

of alleged assets of the Atlantic Company, it must be regarded as auxiliary, and the same finality attaches to the decree of the Circuit Court of Appeals therein.

"And this is true, although another ground of jurisdiction might be developed in the course of the proceedings, as it must appear at the outset that the suit is one of that character of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked." **Pope vs. Louisville Ry. Co., 173 U. S. 573 (578).**

These decisions constitute an unbroken line, and all were rendered without dissent.

We have examined the cases cited by the majority of the Court of Appeals in support of its conclusion that that Court is without jurisdiction, and it appears that in each case where the appellate jurisdiction of the Circuit Court of Appeals was denied, and the jurisdiction of the Supreme Court sustained, the jurisdiction of the Circuit Court had been invoked and had attached by reason of the subject matter of the suit, a Federal question having been raised in each instance by the plaintiff's statement of his own case in his original bill or declaration. Such being the case, the jurisdiction of the Circuit Court of Appeals did not attach under Section 6 of the Act of March 3d, 1891, and the jurisdiction of the Supreme Court did attach under Section 5 of the same Act. In other words, the jurisdiction of the Circuit Court was not dependent upon the citizenship of the parties, as it is in the case at bar, and as it was in each of the cases cited herein which were considered by the Supreme Court.

But even if the decisions in **Carter vs. Roberts, 177 U. S. 496,** and **Railroad Co. vs. Thiebaud, 177 U. S. 615,** relied on by the majority Judges of the Court of Appeals, sustain the

conclusion of that Court, we respectfully submit that at the time the writ of error in this case was sued out from the Court of Appeals, the unbroken line of authorities hereinabove cited warranted the action of the plaintiff in error in suing out the writ of error from the Court of Appeals. Had the writ of error been sued out from the Supreme Court, it would have been done in the face of the prior adjudications of this Court as we understand them now and as we understood them at the time the writ of error was obtained.

The warning conveyed by the CHIEF JUSTICE in **Borgmeyer vs. Idler,** quoted above, was too plain to be disregarded:

"The jurisdiction of the Circuit Court depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. Had the case been brought to this Court from the Circuit Court the writ of error could not have been entertained."

We respectfully submit, therefore, that under the circumstances of this case, a writ of *certiorari* should be granted whether the Court shall conclude that the Court of Appeals has or has not jurisdiction.

There is no doubt, as we conceive, as to the right of this Court to remove the case from the Court of Appeals at any stage of the proceedings in that Court. **The Three Friends, 166 U. S. 1 (49); Amer. Const. Co. vs. Jacksonville Ry., 148 U. S. 372 (385).**

If, however, the Court shall conclude that the Court of Appeals has jurisdiction, but shall, in its judgment and

discretion, deny a writ of *certiorari*, we submit, in such event, that a rule should issue against the Judges of the Court of Appeals requiring them to show cause on a day fixed why a writ of mandamus should not issue, directing them to hear, try and adjudge the cause; and that a writ of mandamus should be issued in due course.

Respectfully submitted,

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JANUARY, 1901.